

Bualoy (Migration) [2023] AATA 1943 (17 May 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Sucheera Bualoy
CASE NUMBER:	1905319
HOME AFFAIRS REFERENCE(S):	BCC2016/3871188
MEMBER:	Naomi Schmitz
DATE:	17 May 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2) of Schedule 2 to the Regulations; and • cl 820.221(1) and (4) of Schedule 2 to the Regulations.

Statement made on 17 May 2023 at 10:59am

CATCHWORDS

MIGRATION –Partner (Temporary) (Class UK) visa – Subclass 820 – the parties were validly married – parties were and continue to live together in a genuine and continuing relationship – parties are reciprocally recognised by one another’s family as spouses – parties have displayed the degree of companionship and emotional support – decision under review remitted

LEGISLATION

*Migration Act 1958, ss 5, 65, 360
Migration Regulations 1994, r 1.15, Schedule 2, cls 820.211, 820.221*

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 17 November 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 820.211(2) and cl 820.221(2) because there was insufficient evidence to be satisfied that the parties were in a genuine and continuing spousal relationship as set out in reg 1.15A of the Regulations.

4. Background

5. The applicant is a 37-year-old citizen of Thailand. She first arrived in Australia in July 2010 as the holder of an Independent ELICOS Sector (Subclass 570) visa. She was subsequently granted three Student (Subclass 573) visas between December 2010 and September 2013 and a Vocational Education and Training Sector (Subclass 572) visa in October 2014 which ceased on 18 November 2016. The sponsor is a 42-year-old Australian citizen. The parties have not been previously married and do not have any children from any prior relationship.
6. The applicant and sponsor first met on 1 March 2013 at a Thai grocery shop in Springvale. The parties had a mutual friend who worked at the store and introduced them to one another. The parties subsequently communicated via Facebook and exchanged mobile phone numbers. The parties claim they communicated regularly and later arranged to meet in-person with the sponsor showing the applicant various places in Melbourne. He later introduced the applicant to his family and friends. The applicant also introduced the sponsor to her friends and her sister who resides in Victoria. The applicant's parents reside in Thailand and therefore the applicant and sponsor would video-call the applicant's parents.
7. On 8 June 2014, the sponsor asked the applicant to be his girlfriend. On 1 October 2014, the applicant moved into the sponsor's family home in Wantirna South. The parties thereafter lived together, along with the sponsor's mother, the sponsor's older sister and older brother and his wife and two children. The applicant claims she contributed to the household by purchasing groceries and paying for the applicant and sponsor's food when they ate out. The parties claim that the applicant got on well with the sponsor's family and that she was accepted by his family. After the applicant finished her studies, the parties seriously discussed their future together and the sponsor asked the applicant to stay with him in Australia.
8. The parties married at the Victorian Marriage Registry in East Melbourne, Australia on 30 January 2016. A certified marriage certificate dated 20 April 2016 was filed in support which the Tribunal accepts. The Tribunal notes that the applicant's sister and the sponsor's brother were witnesses to the marriage. The parties also provided photographic evidence depicting the applicant and sponsor and some immediate family, including the sponsor's mother, brother, sister and the applicant's sister.

9. On 20 March 2016, the applicant and sponsor travelled to Thailand for a month where the sponsor met the applicant's parents, cousin and Thai friends. The applicant and sponsor subsequently took the applicant's parents and aunty to Laos, where the sponsor was born.
10. The parties both state that they lived apart in late 2016 due to the applicant's father being seriously ill and diagnosed with heart valve disease. He underwent heart surgery in October 2016. Medical evidence was filed in support.¹ Due to his serious condition and the surgery being high risk, the applicant travelled to Thailand to support and care for her father and provide emotional support to her mother and younger sister. Travel movement records obtained by the Tribunal confirm the applicant was offshore for approximately one month departing Australia on 11 October 2016 and returning on 11 November 2016. The sponsor was unable to accompany the applicant due to his work commitments which the Tribunal accepts. The parties claim that whilst they were apart, that they maintained daily contact through phone and video calls. The applicant's father has since made a recovery.
11. The applicant and sponsor subsequently conducted a large wedding reception and ceremony in Thailand on 30 December 2017. The occasion was attended by approximately 300 guests, including the applicant's family in Thailand, the sponsor's family and applicant's sister who flew from Australia to Thailand and various friends. Travel movement records obtained by the Tribunal confirm that the applicant and sponsor both departed Australia on 25 December 2016 and returned on 13 January 2017. Photographic evidence depicting the parties with family and friends was also provided which supports the parties' claims.
12. The parties lodged the applicant's Partner (Subclass 820/801) visa application without the assistance of a migration agent or lawyer.
13. The delegate who considered the application noted:
 - a. The application was heavily based on the parties' claims that were not supported by independent and credible evidence (i.e. financial records showing the parties shared financial responsibility or the nature of their household);
 - b. Limited photographic evidence and one statutory declaration (i.e. from the sponsor's sister) did not provide convincing information of the social recognition of the parties' relationship. This particularly concerned the delegate in light of the claimed length of the parties' relationship since 8 June 2014 and subsequent marriage on 30 January 2016; and
 - c. The marriage certificate did not constitute convincing evidence of the nature of the parties' commitment to one another.
14. Taking into account these matters, the delegate found that the parties were not in a genuine and continuing relationship and therefore the applicant was not the spouse of the sponsoring partner as defined in s.5F of the Act. Accordingly, the delegate found that the applicant did not meet the criteria in cl. 820.211(2) and 820.221 and refused the application.
15. On 6 March 2019, the applicant applied to the Tribunal for a review of the refusal decision.
16. In response to requests by the Tribunal to provide information, the applicant provided various information regarding the financial aspects of the parties' relationship, the nature of the parties' household, the social aspects of the parties' relationship and the nature of the parties' commitment to each other.

¹Medical evidence from Department file.

17. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. The issue in the present case is whether the applicant is the spouse of the sponsoring partner as defined in s.5F of the Act.

Whether the parties are in a spouse or de facto relationship

19. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
20. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

21. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married on 30 January 2016. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

22. Are the other requirements for a spouse relationship met?

23. Financial aspects

24. The applicant and sponsor commenced residing together in October 2014. During this time, they resided with the sponsor's family in Wantirna South. The parties claim they stayed with the sponsor's family to save money and during this time shared a joint saving account which they both contributed to and was later used to purchase a property in Rowville. In support the applicant filed various ANZ bank joint savings account statements featuring the applicant and sponsor's names at their Wantirna South address. The financial transaction history supports the parties' claims.
25. Using their savings, the parties purchased a house in Rowville on 20 June 2021. In support the applicant provided a signed contract of sale (signed by the applicant and sponsor), a property settlement letter (addressed to the applicant and sponsor); Commonwealth Bank of Australia mortgage documents confirming the applicant and sponsor are joint mortgagors of the property, the applicant's Victorian probationary driver licence bearing the Rowville address and an electricity account statement in the parties' joint names. The parties state they moved into their Rowville property on 29 August 2021.

26. Since moving into their family home, the parties have divided the household expenses using their personal accounts. The applicant is responsible for paying for the parties' living expenses, such as grocery shopping, furniture, household appliances, personal care, dining out and holiday flights and accommodation. In support the applicant provided a bank account statement and various furniture invoices, including for the purchase of a dining table, lounge chair and a washing machine in her name and addressed for delivery to the Rowville address. The sponsor is responsible for paying mortgage and utility bills.
27. The parties each provided their taxation returns for the years 2018, 2019, 2021 and 2022. Their taxation returns for several financial years, reflects that the parties have nominated each other as being their respective spouses, indicating that they are declaring themselves as such to key Australian government organisations, namely the Australian Taxation Office (ATO). The parties also provide copies of their superannuation policies where they have nominated each other as their 100% death beneficiary.
28. The Tribunal has carefully reviewed the documents referred to in [21] to [24] above which the Tribunal considers to be credible and independent evidence. The Tribunal places significant weight on the parties' joint purchase of their family home, joint savings history, and the parties' ATO returns which reflect a degree of financial commitment and joint responsibility that would be expected of a married couple. The Tribunal accepts that the division of financial responsibility, that is the sponsor servicing the mortgage and the applicant meeting the daily household expenses and major household purchases is an equitable division of the household responsibility and suits the parties' financial circumstances. Overall, the Tribunal finds the financial aspects of the relationship support a finding that both at the time of application and at the time of decision, the parties were and continue to live together in a genuine and continuing relationship with a mutual commitment to a shared life as husband and wife to the exclusion of all others.

29. *Nature of the Household*

30. The applicant and sponsor do not currently have any children together, however plan on commencing a family which is discussed further in [38] below. The parties have been residing continuously together since October 2014, well before the application was lodged in November 2016. As outlined above, the parties commenced living with the sponsor's family to save for a property and their future together. The Tribunal has had regard to the statutory declaration by the sponsor's sister who attests to the parties residing together at the family's Wantirna South home.
31. The applicant and sponsor jointly share the household chores which they undertake in a flexible manner. Whoever has more spare time during the week does the majority of the chores. The parties undertake the grocery shopping together during any nights that they are free or on the weekend. The applicant is mainly responsible for cooking dinner and washing up and preparing the parties' lunches. The applicant does the cleaning and laundry on the weekend and the sponsor does cleaning such as vacuuming and mopping the house on weekdays after he finishes work, as he finishes work earlier than the applicant. The sponsor is responsible for washing the parties' cars and doing the lawnmowing and gardening.
32. The Tribunal has had regard to the applicant and sponsor's statements which the Tribunal accepts. Overall, the Tribunal finds that at both the time of application and at the time of decision, the parties were and continue to live together in a genuine and continuing relationship with a mutual commitment to a shared life to the exclusion of all others.

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35. *Social aspects*

36. The parties submitted photographic evidence depicting themselves in various social settings and over different years, including on holidays and socialising with family and friends. The Tribunal has also had regard to the statutory declarations from the applicant's sister and brother-in-law² and updated statutory declarations from the applicant and sponsor which submit that the Tribunal ought to be convinced that the relationship is genuine and continuing because the parties have lived together and been married for a long time, have supported each other through difficult times, including the applicant's father's heart surgery, that the parties have worked and saved hard to purchase a family home together and have travelled together extensively.
37. The Tribunal accepts that the parties are reciprocally recognised by one another's family as spouses. The Tribunal notes the applicant's sister and sponsor's brother were marriage witnesses. The Tribunal also considers the lavish Thai wedding attended by 300 guests provides strong evidence that the relationship is widely recognised and accepted by the parties' families, friends and local community. Every month the applicant and sponsor visit Geelong to see the applicant's sister and brother-in-law who run a local restaurant. The applicant's parents recently visited from Thailand, staying with the applicant and sponsor at their Rowville home for approximately two months. The Tribunal accepts that the sponsor's mother and sister are regular visitors to the parties' home. The parties' parents are also close and socialise together when the applicant's parents visit from Thailand. The applicant provided screenshots from her Facebook social media account which depict images and posts of the applicant and sponsor together with family and friends. The Tribunal places some positive weight in the applicant's favour.
38. The parties claim to have travelled extensively together. Travel movement records obtained by the Tribunal confirm the same. Although on two occasions the arrival and departure dates varied by a number of days, the Tribunal does not regard this as significant. Overall, the Tribunal places some positive weight in the applicant's favour.
39. Travel movement records disclose the applicant and sponsor:
- a. Departing Australia on 19 March 2016 and returning on 7 April 2016;
 - b. Departing Australia on 8 July 2016 and returning on 30 July 2016;
 - c. Departing Australia 25 December 2016 and returning on 13 January 2017;
 - d. Departing Australia on 13 October 2017 and returning on 3 November 2017 (applicant arriving earlier on 28 October 2017);
 - e. Departing Australia on 6 December 2017 and returning 31 January 2018; and
 - f. Departing Australia on 10 January 2019 and returning on 2 February 2019 (applicant departing on 1 January 2019).
40. Overall, the Tribunal is satisfied that the social aspects indicate that the parties are living together and are recognised by their families, friends and the general community as being genuine spouses. As outlined in [24] the parties are also legally recognised by key Australian government agencies such as the ATO as spouses which the Tribunal places significant weight on.

41. *Commitment to each other*

² Statutory declarations of Somprasong Haisok and Janejira Bualoy both dated 9 February 2023.

42. The Tribunal accepts that this is a longstanding relationship now of approximately eight years duration. Since meeting in March 2013, the parties have invested a significant amount of time and energy and slowly got to know each other, first becoming friends, before deciding to commence a relationship in June 2014. Four months later, the parties moved in together in October 2014 and in 2016 seriously discussed their future.
43. The parties showed their mutual commitment to one another by setting up a joint savings account and saving for many years to purchase a family home and invest in their future.
44. In January 2016, they furthered their commitment to one another through marriage which was witnessed by the applicant and sponsor's family members. They further demonstrated their commitment by holding a Thai wedding ceremony and wedding in December 2017.
45. Since the parties married over seven years and three months ago, the couple have built a stronger connection and have developed their relationship further. The couple have spent much of their free time together, lived through the COVID-19 pandemic together, saved and purchased a property together, assisted each other through hard times including the applicant's father's heart surgery and established their new family home. The Tribunal has had particular regard to the applicant's claims that when her father underwent heart surgery that it was a 'hard time in my life' however she considered herself 'lucky that my husband understood and supported me throughout all that time'. She states that the sponsor has always made her feel 'special' and taken care of her from the day the parties first met. He has been her 'best supporter, whenever I feel sad or stress, I always got good advise (sic) from him'.
46. The parties wish to commence a family together. In support the applicant provided an ultrasound of her pelvis³ to confirm her fertility. The parties also have travel plans to visit the applicant's family in Thailand and visit to Vietnam and Laos in mid-May 2023.
47. The Tribunal has carefully considered the parties' statements, the supporting statutory declarations from family and various documentary evidence that was submitted in support. Overall, the Tribunal is satisfied that the parties have displayed the degree of companionship and emotional support which would be expected for parties who have a mutual commitment to a shared life to the exclusion of all others and that the relationship is genuine and continuing. The parties have plans for their future together which showed that they consider the relationship as long term.

48. *Conclusion*

49. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made and at the time of this decision.
50. Having considered the evidence individually and cumulatively, and given the findings above, the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made and at the time of this decision. Therefore, the applicant meets cl 820.211(2) and cl 820.221(1) and (4).
51. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

52.

³ Capital Radiology scan

DECISION

53. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl 820.211(2) of Schedule 2 to the Regulations; and
- cl 820.221(1) and (4) of Schedule 2 to the Regulations.

Naomi Schmitz
Member

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ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).